

APPEAL NO. 100693
FILED AUGUST 19, 2010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 7, 2010. The two disputed issues reported from the benefit review conference (BRC) were:

1. Does the compensable injury of _____, extend to include impingement of the right rotator cuff tendon at the AC joint, L4-5 right paracentral disc herniation, L5-S1 annular tear, L5-S1 central/left paracentral disc herniation, and a cervical sprain/strain?
2. Did the appellant/cross-respondent (claimant) have disability resulting from an injury sustained on _____, for the period of time beginning on December 24, 2008, through August 3, 2009?

The hearing officer determined that: the compensable injury of _____, includes impingement of the right rotator cuff tendon at the AC joint, and a cervical sprain/strain, but it did not include an L4-5 right paracentral disc herniation, an L5-S1 annular tear, or an L5-S1 central/left paracentral disc herniation; and the claimant had disability beginning December 24, 2008, through August 3, 2009.

The claimant appeals the hearing officer's determination on those extent-of-injury conditions which were adverse to him. Respondent 1/cross-appellant (carrier) cross-appeals the hearing officer's determinations on extent-of-injury conditions adverse to the carrier and on disability. In addition, the carrier cross-appeals a finding of fact in which the hearing officer included a finding that the compensable injury extends to a "thoracic strain." The carrier and the claimant both filed responses to the other's appeal. Respondent 2 (subclaimant) did not appear at the CCH and did not appeal or respond to any appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant and the carrier stipulated that the claimant sustained a compensable injury on _____.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, includes impingement of the right rotator cuff tendon at the AC joint, and a cervical sprain/strain, but it did not include an L4-5 right paracentral disc herniation, an L5-S1

annular tear, or an L5-S1 central/left paracentral disc herniation is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability beginning on December 24, 2008, through August 3, 2009, is supported by sufficient evidence and is affirmed.

EXCEEDING SCOPE OF ISSUE

The hearing officer, in Finding of Fact No. 4, found that the "preponderance of the evidence reflects that on _____ [the] [c]laimant sustained injuries in the course and scope of employment in the nature of cervical and thoracic strains and a right shoulder impingement" The extent-of-injury issue certified out of the BRC, and agreed upon the record by the claimant and the carrier at the CCH, did not include the issue of whether the compensable injury included a "thoracic strain."

The designated doctor appointed for maximum medical improvement (MMI), impairment rating (IR) and return to work, in a report dated April 20, 2009, had an impression that the compensable injury included a cervical, thoracic and lumbar strain; however, the narrative portion of the report notes CT testing for the cervical, thoracic and lumbar spine "showed no abnormalities." In a follow-up report dated August 3, 2009, the designated doctor again has an impression of cervical, thoracic and lumbar strain but in certifying the MMI date and assessing an IR makes no reference to a thoracic strain. The record contains nothing more than a mere passing reference to a thoracic strain. There is no evidence regarding a causal connection between the compensable injury of _____, and a thoracic strain.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The evidence establishes that the carrier did not consent to adding the thoracic strain as part of the extent-of-injury issue and a thoracic strain was not actually litigated at the CCH. Consequently, the hearing officer exceeded the scope of the extent-of-injury issue before him in finding that the claimant sustained a thoracic strain. We reverse so much of Finding of Fact No. 4 which refers to a thoracic strain and render a new decision by striking the words "and thoracic strains" and substituting the word "a" before cervical and the words "sprain/strain" after cervical in Finding of Fact No. 4, to be consistent with the conclusion of law and the decision portion of the hearing officer's decision and order.

The true corporate name of the insurance carrier is **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Veronica L. Ruberto
Appeals Judge